Comparative Administrative Law

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RESEARCH HANDBOOKS IN COMPARATIVE LAW

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

8 Good-bye, Montesquieu

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If the field of comparative administrative law is to have a future, we must build a new framework for analysis. The traditional contrast between common and civil law systems is a non-starter: Whatever its value in the private sector, it was never built to highlight the distinctive characteristics of administrative law. The same holds true for familiar models focusing on comparative criminal procedure (Damaska 1986).

Models built on particular national experiences have their uses. The French Conseil d'Etat has had an influence in some other nations; as has the German system of administrative courts. But in the twenty-first century, we need a much broader framework that invites disciplined comparisons on a world-wide basis, and informed normative reflection on the evolving lessons of experience.

This requires us to move decisively beyond Montesquieu's reflections on the separation of powers (Montesquieu 1989). No other field of academic inquiry is so dominated by a single thinker, let alone an eighteenth-century thinker. However great he may have been, Montesquieu did not have the slightest inkling of political parties, democratic politics, modern constitutional designs, contemporary bureaucratic techniques, and the distinctive ambitions of the modern regulatory state. And yet we mindlessly follow him in supposing that all this complexity is best captured by a trinitarian separation of power into the legislative, judicial, and executive – with comparative administrative law somehow captured in the last branch of the trinity.

Give Montesquieu his due. His theory represented a fundamental advance over traditional Aristotelian understandings of mixed government. Within this earlier framework, different branches represented different social classes – for example, the British House of Commons represented the class of commoners; the Lords, the lords; and the Crown, the biggest honcho of them all (Vile 1967).

Montesquieu rejected this class-based understanding. His different branches corresponded to different functions of government. In taking this functionalist turn, he followed Locke, who had also separated out three government functions for separation-of-powers treatment. But Locke's trinity was different: He placed the judiciary in the 'executive' box, filling the void with a 'federative power' dealing with foreign relations, yielding legislative-executive-federative as his trio (Locke 1987). Because Montesquieu was himself a judge,[1] he believed it especially important to emphasize the independence of the judiciary in the French monarchy, but he did so at the cost of suppressing Locke's insights into the distinctive functioning of the state in foreign affairs. And so he derived the now-classic trinity: legislative, executive, judicial. Apparently, trinitarian thinking

[1] Technically, Montesquieu was President of the Parliament of Bordeaux, and it is an oversimplification to describe this body as a court. But its judicial function provided an important check on the absolutist ambitions of the French monarchy.

was so overwhelming in the eighteenth century that Montesquieu could not tolerate four boxes in his conceptual scheme.

Almost three centuries later, it is past time to rethink Montesquieu's holy trinity. Despite its canonical status, it is blinding us to the world-wide rise of new institutional forms that cannot be neatly categorized as legislative, judicial, or executive. Although the traditional tripartite formula fails to capture their distinctive modes of operation, these new and functionally independent units are playing an increasingly important role in modern government. A 'new separation of powers' is emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual framework containing five or six boxes – or maybe more. And so we must say a fond farewell to Montesquieu, and create a new foundation for comparative administrative law that is equal to the challenges of modern government.

To see my point, look at what is actually happening in the twenty-first century: Can we observe world-wide tendencies to insulate certain functions from the legislative, executive *and* judicial branches of government? If so, what are they?

For starters, consider the world-wide rise of independent election commissions. In which of the three boxes do they belong? Occasionally, courts do function to check the integrity of elections, as in the case of the French Conseil Constitutionnel (Turpin 1986: 265–82). But more frequently, these special electoral institutions are entirely separate from the regular judiciary as well as from the political branches. For good reason. On the one hand, it makes sense for the independent electoral commission to run the ballot process from start to finish, and not only to act like a court, intervening afterwards to determine whether there was cheating going on. At the same time, it is essential to insulate its operation from the political branches – because it is precisely the sitting politicians in charge of the 'executive branch' who have the incentive and the power to manipulate the vote-count to insure their reelection. As a consequence, modern constitutions increasingly treat election commissions as a distinct branch of government, taking special steps to protect their integrity. And even if a country's constitution does not formally guarantee the independence of the electoral commission, statutory law frequently insulates it from political interference in a host of unconventional ways (Ackerman 2000: 716–21).

Using the electoral commission as an example, consider the four-stage analysis that permits an assessment of an institution's legitimate position in the new separation of powers. The first step involves the identification of a fundamental governmental value: in this case, the proponents of electoral commissions invoke the value of *democracy* in making their case for institutional independence. The next step requires proponents to explain why their favored value requires the institution to receive special constitutional protection from outside forces. In this case, proponents of independent commissions point to the obvious danger of the 'fox guarding the henhouse' – political incumbents awarding themselves another term in office by manipulating the vote-count. The third step identifies techniques of institutional insulation that will give the 'newly separated power' an incentive to do a better job. This emphasis on institutional design, in turn, leads to the fourth and final step: comparative empirical analysis. For example, why does the Indian Electoral Commission do a relatively good job insuring an accurate vote count in a bureaucratic system otherwise scarred by massive corruption and inefficiency (Ackerman 2000: 718–21)? What lessons can be learned from the recent unsatisfactory

performance by the Mexican commission in handling the contested presidential election of 2006 (Ackerman 2010)? And so forth.

On the basis of these comparative inquiries, scholars may contribute to the design of better institutions and provoke critical inquiry into the distinctive weaknesses of different constitutional systems. Consider, for example, the infamous election contest between Bush and Gore in 2000. Montesquieu must take part of the blame for the spectacularly poor performance of American institutions in resolving the dispute. Given the country's traditional commitment to Montesquieu's trinity, it seemed obvious to the leading participants that the administration of elections is just-another-ordinary-part of the executive branch. After all, it certainly is neither legislative nor judicial – and the only other box that remains is executive. Therefore, voting administration must be executive – it's positively un-American to think that there is a fourth category, isn't it?

This unthinking trichotomy allowed the Florida executive to engage in political shenanigans as she supervised the administrative process through which Bush was finally declared the 'winner'. America badly needs an independent electoral commission, but it will not get one until it awakes from its Montesquieuan slumbers and joins the movement toward a new separation of powers sweeping the world today. There are, as we have seen, compelling reasons for independent electoral commissions; compelling enough for most countries to put the idea into practice. Why shouldn't the USA take notice?

Another world-wide trend suggests the potential scope of the four-stage analytic framework that I have sketched. Consider the massive shift toward independent central banks during the past half-century (Kleineman 2001). Substantively, central banks look very different from electoral commissions. But analytically, they raise the same questions. Begin by defining the fundamental values at stake. Here the governing value certainly is not democracy. It is instead neo-liberal economic theories that emphasize the importance of insulating the money-supply from short-term political manipulations, and insist that economic science has provided technocrats with superior analytic tools for regulating key macro-variables. As before, the first task is to evaluate the relevant value judgments underlying neo-liberal economic philosophy; the second task is to assess claims about political incentives – is it really true that political incumbents have counterproductive incentives to manipulate the money-supply to win reelection? The third task explores different institutional designs for independence – how does the design of the Federal Reserve differ from that of the Bank of England? Finally, we need extensive empirical work to figure out how different designs work out in practice.

I have explored other aspects of the new separation of powers elsewhere (Ackerman 2000). But for now, it is enough to note a couple of obvious issues. First, the question of coordination: the more power-centers we insulate from the classic political and judicial institutions, the greater the problem we have in coordinating the proliferating number of separated powers into a coherent whole. Second, the question of democratic legitimacy: if we go too far in insulating too many branches from direct political control, we may deprive the democratic process of its central significance – leaving elected representatives of the people at the mercy of independent central bankers, and others, who are insulated from their direct control.

These two problems suggest care in creating new independent power-centers. But they do not suggest that it never makes sense to create a new separation of power. Instead, they suggest a cautious approach: we should reserve this strategy for the protection of

especially fundamental governmental values, in contexts where normal political incentives are especially pernicious, and with institutional designs that are well-conceived, and if at all possible, empirically tested. The construction of new power-centers, in short, requires a host of complex and context sensitive judgments.

Only one thing is clear: We will get nowhere in making these judgments if we content ourselves with repeating Montesquieu's mantra. Instead, we must modify the mantra to take account of an institutional world in which independent institutions play increasingly important functions – even though they cannot be classified as legislative or judicial or executive.

The holy trinity has a second defect; it encourages us to ignore the different dynamics governing administrative operations in parliamentary and presidential regimes. Formally speaking, it is easy for Montesquieuans to disregard this difference when describing the separation of powers in legal terms. On the standard account, both presidents and prime ministers are the head of the executive branch, and, therefore, the head of public administration.

But serious comparative studies must go beyond this formal parallelism. The prime minister and his cabinet really can exercise monopoly control over the bureaucracy; but presidents must compete for control with an independently elected Congress. Legislative leaders have their own weapons for pushing the bureaucracy in their direction – most importantly, they can threaten the agency with reduced funds if it does not follow their priorities. To parry these threats, presidents appoint political loyalists to the upper reaches of the administration. President Obama, for example, has to fill 3000 positions before his government can become fully operational (Lewis 2008: 56).

By putting loyalists in charge, the president hopes to guarantee that the ministries and agencies will use their discretion to follow his priorities, not those of his political rivals in the legislature. But this technique by no means assures that he will exercise the same degree of administrative control as that asserted by a prime minister. By assuming, with Montesquieu, that presidents are chief executives, comparatists run the risk of ignoring this key point.

The conflict between presidents and legislatures is mediated by the particular rules and structures put in place by different constitutional regimes. If presidents must gain Congressional approval for their appointments, it will be tougher for them to colonize the bureaucracy with super-loyalists. At the same time, Congressional control over the budget varies from system to system. This opens up a rich field for comparative study, as we consider the impact of different constitutional regimes on the on-going competition between president and Congress for bureaucratic influence.

These fascinating variations should not drown out a common theme: Presidential systems encourage the politicization of the bureaucracy, leading to the demotion of career civil servants to second-tier positions as presidents keep pushing political loyalists into key administrative positions in their on-going struggles with Congress.

This basic dynamic raises a fundamental normative issue. Quite simply, the politicization of bureaucratic leadership raises a fundamental challenge to the Rule of Law. Presidential loyalists will be sorely tempted to ignore the law if this furthers their leader's political interests. Administrative law in presidential systems should be especially attuned to this threat. This rule-of-law strategy can be pursued in different ways in different places, and may well rely on special administrative structures, and not only courts.

Comparative law has a key role to play in gaining perspective on the merits of competing institutional strategies.

Beyond these important questions of institutional design lurks a larger question: Are the participants in one-or-another presidential system even aware that they have an especially acute rule-of-law problem? In the United States, for example, the answer is No. The prevailing *Chevron* doctrine legitimates massive judicial deference to administrative legal determinations, opening up a wide space for the political abuse of agency discretion.[2]

Bureaucratic dynamics in parliamentary systems lead to very different abuses. The prime minister and his cabinet are themselves the leaders of the parliamentary majority, and their direct control over the legislature eliminates the inter-branch competition that politicizes presidential bureaucracies. Because the prime minister's political monopoly over the bureaucracy is assured, he can take a very different view of the professional civil service. He need not worry that bureaucrats will succumb to pressure from Congressional barons. Instead, he can view them as a key resource in his struggle for political survival. After all, the professionals have a deep understanding of the basic issues, as well as a sense of bureaucratic realities and possibilities. If the prime minister manages to harness their energies, they can help him deliver on his political promises, and increase his chances of victory at the next election. From this perspective, it makes good sense for the top politicians to support a highly professional civil service. The better it is, the better their chances of victory.

This political dynamic is not inevitable. Prime ministers may choose to populate the bureaucracy with their cronies, and use their control over parliament to silence criticism. Cronyism may maximize short-term political support, despite professionalism's long-run political attractions. But once a strong civil service has been established, the political logic of parliamentarianism is likely to sustain the professional tradition – as the examples of the UK, Germany, Italy, and France (in the Third and Fourth Republics) suggest.

This means that parliamentary systems generate distinctive administrative pathologies. Although the civil service in presidential systems tends to be too weak, it now risks becoming too powerful. Prime ministers will come and go, but professionals will stick around for decades, and they can use their monopoly of expertise to manipulate their titular political bosses. A strong civil service may also insulate itself from broader currents of public opinion, and fail to appreciate when its actions seem autocratic or silly or worse. Indeed, it may also insulate itself from on-going currents of scholarly research, and persist with bureaucratic practices and policies that have long since been discredited in serious academic circles. A culture of secrecy is likely to exacerbate all of these bureaucratic rigidities.

This leads to a different set of normative challenges. Administrative law reform in parliamentary systems should emphasize bureaucratic responsiveness to the larger political and social environment. Begin with politics. When a new leadership wins a parliamentary majority, it often confronts a relatively unified team of high civil servants, who may present them with a very limited set of policy options. Special structures are needed to

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[2] See *Chevron, Inc. v. Natural Resources Defense Council,* 467 US 837 (1984). It is one thing for courts to say that they will defer; quite another, for them to act deferentially in concrete cases. The extent of this gap is explored by Eskridge and Baer (2008).

enable a newly elected political majority to gain a broader understanding of their realistic opportunities. One option is a mechanism to facilitate the creation of different teams of top bureaucrats to present rival plans for implementation – with special incentives for Team B to think out of the box.

In the same spirit, top bureaucrats should keep in touch with evolving social realities. Statutes should require administrators to hold broad-based public hearings before promulgating administrative regulations with large-scale impact. And agencies should be required to defend these rules in appeals before courts or other neutral review bodies.

I have pursued such proposals in greater detail elsewhere (Ackerman 2000). For the moment, it is more important to ask the same question we raised in connection with presidential systems. Is one or another national legal culture prepared to do something serious to control the distinctive pathologies characteristic of their parliamentary system?

Quite often, the answer is No. For example, parliamentary systems in Europe have generally been very reluctant to require public hearings, and appellate procedures, of the kind envisioned by the American Administrative Procedure Act – even though bureaucratic responsiveness to civil society is even more important in these systems than in the presidential regime of the United States (Rose-Ackerman 1995).

Comparative administrative law can become an intellectual force for constructive critique. Just as it exposes the American failure to recognize the distinctive need for the rule of law in presidential systems, it also exposes the European failure to recognize the distinctive need for bureaucratic responsiveness in parliamentary regimes.

In conclusion: Good-bye Montesquieu; hello, the twenty-first century and its promise of a new agenda for the comparative study of administrative law.

References

Ackerman, Bruce. 2000. 'The New Separation of Powers', *Harvard Law Review,* 113: 633–729.

Ackerman, John M. 2010. 'The 2006 Elections: Democratization and Social Protest', in Andrew Selee and Jaqueline Peschard, eds., *Democratic Politics in Mexico*, Stanford CA: Stanford University Press-Woodrow Wilson Center for International Scholars, CN.

Damaska, Mirjan R. 1986. *The Faces of Justice and State Authority,* New Haven, CN: Yale University Press.

Eskridge, Willam N. Jr. and Lauen Baer. 2008. 'The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*', *Georgetown Law Review,* 96:1083–1226.

Kleineman, Jan, ed. 2001. *Central Bank Independence: The Economic Foundations, the Constitutional Implications and Democratic Accountability*, The Hague; and Boston: Kluwer Law International.

Lewis, David E. 2008. *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance,* Princeton, NJ: Princeton University Press.

Locke, John. 1987. *Two Treatises of Government*, Richard Ashcraft, ed., London, and Boston: Allen & Unwin.

Montesquieu, Charles de Secondat. 1989. *The Spirit of the Laws,* Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone, trans., New York: Cambridge University Press.

Rose-Ackerman, Susan. 1995. *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States*, New Haven, CN: Yale University Press.

Turpin, Dominique. 1986. *Contentieux Constitutionnel*, Paris: Presse Universitaires de France.

Vile, M.J.C. 1967. *Constitutionalism and the Separation of Powers,* Oxford: Clarendon Press.